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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1152

CEMENT MASONS UNION LOCAL 337, OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION OF THE UNITED STATES, AND CANADA, AFL-CIO, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 50-59) is reported at 468 F. 2d 1187. The Board's decision and order and supplemental decision are reported at 190 NLRB No. 46 and 192 NLRB No. 52 (Pet. App. 3-38). The order of the district court granting a temporary injunction, and its civil contempt adjudication and order (Pet. App. 39-49) are not officially reported.

JURISDICTION

The judgment of the court of appeals enforcing the Board's order was entered on December 19, 1972, and its judgment affirming the district court's contempt order was filed and entered on October 26, 1972[1] (Pet. App. 61-63, 66-67). The petition for a writ of certiorari was filed on February 21, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Board properly found that the union violated Section 8(b)(4)(ii)(B) of the National Labor Relations Act by picketing the real estate development project of a homebuilder with whom the union had no dispute, in an effort to induce members of the public not to purchase his homes because the cement work therein had been performed by a contractor with whom the union had a primary dispute.

2. Whether the district court properly found the union to be in civil contempt of a temporary injunction prohibiting such secondary picketing, which had been issued by the court pursuant to Section 10(l) of the Act.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C.

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[1] Although both cases were consolidated for argument and decision in the court of appeals, the court entered separate judgments at different times. The judgment in the contempt case bears two notations: "filed November 28, 1972," and "filed and entered October 26, 1972" (Pet. App. 66, 67). If the 90-day period for filing a petition for certiorari runs from the latter date, the petition is untimely insofar as it seeks to review the judgment in the contempt case.

151, *et seq.*), are set out at Pet. App. 1-2 and in n. 4, *infra*.

STATEMENT

A. The District Court Proceeding

Whitney, a construction general contractor, was engaged by Shuler, a developer and builder of residential buildings, as the general contractor to build a group of homes, known as Oak Hills, to be sold by Shuler (Pet. App. 4-5). The Union (Cement Masons Union Local 337) had no dispute with Shuler. Moreover, it had never demanded recognition from Whitney, nor was it the bargaining representative of Whitney's employees.[2] (Pet. App. 7-8; Tr. 52-54.)[3]

Beginning May 2, 1970, the Union picketed the entrance to the Oak Hills project on Saturdays and Sundays, when no employees of Whitney or the subcontractor were working at the project, with a sign reading (Pet. App. 6-7; Tr. 5-7, 22; G.C.X. 1(c)):

TO CONSUMERS ONLY

Cement Masons Work Done by General Contractor
Below Standard Established by Cement Masons
Local 337, Monterey County
PLEASE DO NOT PURCHASE THESE HOMES

This weekend picketing reached none of Whitney's employees since they were not at work, but it did reach approximately 80 percent of Shuler's potential buyers (Pet. App. 6; Tr. 91).

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[2] Whitney's employees were represented by the Penisula Craftsmen and Workers Union (Pet. App. 8).

[3] "Tr." refers to the transcript of the hearing before the Trial Examiner in the Board unfair labor practice proceeding, and "G.C.X." to the General Counsel's Exhibits in that proceeding, a copy of these materials has been lodged with the Clerk.

Following the filing of a charge with him, the Board's Regional Director—finding reasonable cause to believe that the Union was engaging in unfair labor practices proscribed by Section 8(b)(4)(ii)(B) of the Act—petitioned the United States District Court for the Northern District of California, pursuant to Section 10(l) of the Act,[4] for an injunction pending the Board's decision on the unfair labor practice charge. On July 29, the district court enjoined the Union, pending a final determination by the Board, from continuing to picket in violation of Section 8(b)(4)(ii)(B). (Pet. App. 7, n. 5, 39-41.)

Following the issuance of the injunction, the Union's representatives were absent from the project until August 15, 1970. On that date and continuing into October, a Union representative appeared at the entrance to the Oak

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[4] Section 10(1), 29 U.S.C. 160(1), provides, in pertinent part, as follows:

> Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(A), (B), or (C) of section 8(b), or section 8(e) or section 8(b)(7), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any district court of the United States (including the District Court of the United States for the District of Columbia) within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: * * *.

Hills project with a sign reading (Pet. App. 7; G.C.X. 2; Tr. 5-7, 46-51):

I am a Cement Mason
Union Handbiller

Please Take My Handbill

The handbills stated (Pet. App. 7; G.C.X. 2):

TO CONSUMERS ONLY

> Please do not purchase these homes. The General Contractor constructed these homes using persons to perform Cement Masons' work below standards established by Cement Masons' Unions in this area.

On November 5, 1970, pursuant to the Board's petition, the district court adjudged that the Union, by continuing to picket the Oak Hills project, was in civil contempt of its prior order. It directed the Union, *inter alia*, to comply with that order. (Pet. App. 42-49.)

B. The Board Decision

In May, 1971, the Board issued its decision. It held that the Union had violated Section 8(b)(4)(ii)(B) of the Act by picketing and handbilling the Oak Hills project with an object of forcing or requiring Shuler to cease doing business with Whitney (Pet. App. 27, 28, 34, 37). The Board found that the Union's conduct "was neither privileged consumer picketing within the *Tree Fruits* [*National Labor Relations Board* v. *Fruit & Vegetable Packers & Warehousemen, Local 760*, 377 U.S. 58] doctrine nor protected as '. . . publicity, other than picketing . . .' within the proviso to Section 8(b)(4)" (Pet. App. 37). The Board ordered the Union, *inter alia*, to cease and desist from the unlawful conduct found (Pet. App. 29-30, 38).

C. The Court of Appeals Decision

The court of appeals sustained the Board's findings and conclusions, and enforced its order. The court agreed that "[t]he present cases are factually unlike *Tree Fruit[s], supra,*" for, "we have here a single product for sale by the secondary, the homes, a part of which, the masons' work, was produced under the disputed labor conditions" (Pet. App. 54). The court further agreed that the Union's conduct after August 15 constituted picketing and was therefore not "publicity, other than picketing, for the purpose of truthfully advising the public," which would have been permitted under the proviso to Section 8(b)(4) (Pet. App. 56).[5]

The court of appeals also held that the district court's "findings and adjudication in civil contempt were [not] clearly erroneous,"[6] and affirmed the contempt judgment of the district court. (Pet. App. 58-59.)

ARGUMENT

1. Section 8(b)(4)(ii)(B) of the Act prohibits the enmeshing of neutral employers in disputes not their own, where an object is to force the cessation of business relations between the neutral employer and any other person. *National Labor Relations Board* v. *Local 825, Operating Engineers,* 400 U.S. 297, 302-303. The Union's

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[5] The court also found, in agreement with the trial examiner (Pet. App. 9-12, 24-25), that, even if the Union's post-August 15 activity did not constitute picketing, the message disseminated in its handbills was false and made " 'with knowledge of, or reckless disregard for, the truth,' " and therefore was not within the publicity provisio in any event (Pet. App. 56).

[6] As noted (n. 1, *supra*), the appeal in the contempt case had been consolidated for argument and decision with the Board unfair labor practice case (Pet. App. 50).

dispute was with Whitney, a general contractor; it picketed Shuler, a homebuilder, urging consumers not to buy his homes, in order to compel Shuler not to deal with Whitney. The Union contends that this classic secondary boycott activity is not prohibited by Section 8(b)(4) under *Tree Fruits, supra.* The Board and the court of appeals correctly rejected this contention.

In *Tree Fruits* the union called a strike against Washington fruit packers. The struck firms sold Washington State apples to the Safeway chain of retail stores. The union picketed Safeway stores requesting customers not to purchase Washington State apples, "which were only one of numerous food products sold in the stores" (377 U.S. at 60). This Court found such picketing to be lawful because it was "employed only to persuade customers not to buy the struck product" (*id.* at 72).

The Court, however, distinguished the situation where "consumer picketing is employed to persuade customers not to trade at all with the secondary employer * * * " (*ibid.*). The Court reasoned: "In the [former] case, the union's appeal to the public is confined to its dispute with the primary employer, since the public is not asked to withhold its patronage from the secondary employer, but only to boycott the primary employer's goods. On the other hand, a union appeal to the public at the secondary site not to trade at all with the secondary employer goes beyond the goods of the primary employer, and seeks the public's assistance in forcing the secondary employer to cooperate with the union in its primary dispute" (*id.* at 63-64).

The latter was the situation here. As the court below noted, "we have here a single product for sale by the

secondary, the homes, a part of which, the masons' work, was produced under the disputed labor conditions" (Pet. App. 54). Accordingly, "[e]ven if the Union had tailored its attack directly against Whitney, so that consumers could identify him as the sole subject of dispute, the broad suggestion that his products not be purchased still necessarily encompassed the entire business of Shuler, the neutral secondary" (Pet. App. 57).[7]

The Union's contention (Pet. 6) that its picketing did not call for a total boycott of Shuler's business, since it was not extended to other locations where Shuler had "homes and apartments under construction, and for sale, and for rent," misconstrues the basis of *Tree Fruits*. There, the Court did not hold that the union could establish a total boycott of some of the stores in the Safeway chain so long as no picketing was conducted at other locations where Safeway did business. Rather, the Court was concerned with the stores which were handling the "struck product," distinguishing between economic pressure at those stores designed to secure "diminished * * * purchases of the struck product" and that designed "to inflict injury on the [the neutral employer's] business generally" (377 U.S. at 72). Here, consumers who responded to the Union's appeal at Oak Hills could only totally boycott Shuler's houses at that location.

Nor is there merit to the Union's contention (Pet. 7-8) that the decision below "denies construction workers the equal protection of the law." In a variety of business

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[7] Moreover, as the court below added, the Union's signs did not mention Whitney as the general contractor with whom the Union was in dispute; thus "[c]onsumers here could reasonably expect that they were being asked not to transact any business whatsoever with Shuler" (Pet. App. 57).

relationships, the courts have uniformly held "*Tree Fruits* to be inapplicable where the struck 'product' has become an integral part of the retailer's entire offering, so that the product boycott will of necessity encompass the entire business of the secondary employer." *Honolulu Typographical Union, No. 37* v. *National Labor Relations Board,* 401 F. 2d 952, 955 (C.A. D.C.) (primary employer was a newspaper; secondary employers were restaurants). See also *American Bread Co.* v. *National Labor Relations Board,* 411 F. 2d 147, 154 (C.A. 6) (primary employer was a wholesale bakery; secondary employers were restaurants); *National Labor Relations Board* v. *Twin City Carpenters District Council,* 422 F. 2d 309, 314-315 (C.A. 8) (primary employer was a cabinet manufacturer; secondary employer was a general housing contractor); *National Labor Relations Board* v. *Building Service Employees Int'l Union, Local 105,* 367 F. 2d 227, 229 (C.A. 10) (primary employer was a janitorial service contractor; secondary employer was a bank); *National Labor Relations Board* v. *Local 254, Building Service Employees Int'l Union,* 376 F. 2d 131 (C.A. 1), certiorari denied, 389 U.S. 856 (primary employer was a janitorial service contractor; secondary employer was an airline). The construction industry is thus treated no differently than any other industry insofar as the application of *Tree Fruits* is concerned.

2. It is doubtful whether the petition is timely with respect to the final question which the Union raises (Pet. 3, 11)—"[w]hether handbilling can be the basis of a contempt order for violation of an injunction prohibiting picketing"—(see n. 1, *supra*). In any event, that question is not presented on this record. For both the Board (Pet. App. 34, n. 1) and the court below (Pet. App. 56) found that the Union's conduct after August 15 constituted picketing. This finding is warranted in the circumstances of this case. As the court stated:

> But the mere use of a handbill does not convert [the Union's] action into unsanctioned "publicity, other than picketing, for the purpose of truthfully advising the public" that the product is a subject of dispute. 29 U.S.C. §158(b)(4)(ii)(B), *supra; Tree Fruit[s], supra,* 377 U.S. at 70-71. The sign simply referred to the handbill, which stated the Union's message. We have no difficulty agreeing with the Board that this was picketing. * * * [Pet. App. 56.][8]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL, 1973.

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[8] The Union's contention (Pet. 3, 9-11) that "[s]ubstantial evidence does not support the finding * * * that the handbilling was untruthful" merely raises a factual issue, which does not warrant further review. In any case, the issue is not presented, because of the clearly warranted finding that the Union's post-August 15 conduct constituted "picketing," rather than other "publicity."